ZEN COURTS SDN BHD v. BUKIT JALIL DEVELOPMENT SDN BHD & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
DAVID WONG DAK WAH JCA
VARGHESE GEORGE JCA
[CIVIL APPEALS NO: W-02(IM)(NCC)-1803-08-2013
& W-02(IM)(NCC)-1804-08-2013]
7 DECEMBER 2015

COMPANY LAW: *Shares – Sale of shares – Allegation of minority oppression in affairs and management of company – Order for buy-out of shares – Appointment of independent valuer to determine price of shares – Application by minority shareholder seeking representations be made on valuation report – Determination of final value by court – Whether order of court precluded parties from challenging valuation report – Whether independent valuer gave sufficient regard to valuation done by another valuer – Companies Act 1965, s. 181*

COMPANY LAW: *Shares – Valuation – Sale of Shares – Allegation of minority oppression – Order for buy-out of shares – Appointment of independent valuer to determine price of shares – Determination of final value by court – Whether order of court precluded parties from challenging valuation report – Whether independent valuer gave sufficient regard to valuation done by another valuer*

The present appeals emanated from two applications that were heard together in the High Court. The two applications before the High Court was consequential to and flowed from an earlier order made in this petition under s. 181 of the Companies Act 1965. The petition was premised upon allegations by the appellant who held 30% of shares in the first respondent, that there was minority oppression in the affairs and management of the latter. The High Court disposed the petition and ordered that there be a buy-out of the appellant's shares in the first respondent by the second respondent ('the 27 March 2012 order'). The parties appointed an independent valuer ('FHMH') to determine the price of the subject shares. In the final valuation report ('FVR'), the appellant's shares on a 'net tangible assets' basis ('NTA') was valued at RM35.97 million. The appellant made an application to the High Court *via* encl. 80, seeking an order that representations be made on the valuation report. On the other hand, the second respondent applied *via* encl. 84 for an order that the court determines the final value, being the price of the 4,500,000 shares of the petitioner in the first respondent and the second respondent shall buy and the petitioner shall sell shares at the price so determined. The High Court dismissed encl. 80 and allowed encl. 84. Hence, the appellant filed the present appeals against the High Court's decision of (i) dismissing encl. 80; and (ii) granting

A the orders in encl. 84. The appellant submitted that (i) the 27 March 2012 order did not preclude the parties involved of coming to the court to challenge the FVR if either of them was unhappy with the reported valuation of the price for the subject shares; and (ii) FHMH failed to adopt or give sufficient regards to the valuation done by another valuer ('Hartanah') which B had been submitted by the appellant to substantiate a higher gross development value in respect of the land belonging to the first respondent.

Held (dismissing appeals with costs)
Per Varghese George JCA delivering the judgment of the court:

C **(1)** The 27 March 2013 order was in the nature of a 'final judgment' disposing off conclusively the rather contentious petition. There was no cause for any doubt that the orders made were intended to bring a closure to the dispute between the parties, save only for a process for the determination of the value of the appellant's shares to be taken over by the second respondent. There was also no appeal by either the D concerned parties against that judgment or in regard to the other consequential orders made and nor was there any clarification or variation sought by the judge as to the purport or extent of those terms. (paras 17 & 18)

E **(2)** The consequential or ancillary orders enumerated in the 27 March 2012 order were principally intended to assist the court to fix a final value for the shares in question. In the ancillary order, the parties were to appoint a mutually agreed independent valuer. This had been given effect without recourse to the court. The significance of this was that the parties were satisfied as to the credentials and independence of the single F expert valuer, thus explicitly agreeing to be bound by the result of the valuation that was to be undertaken by FHMH. (paras 19 & 20)

(3) It was expressly provided in 27 March 2012 order that the parties were to make 'representation' to the valuer in respect of the valuation being undertaken at the behest of the court. The appellant was not denied this G basic right and was in fact availed of this opportunity by submitting Hartanah's valuation report to this end. There had been an upward revision by FHMH in the FVR of the value for the subject shares when contrasted with the value that had been originally proposed in the draft valuation report circulated to the parties for their feedback. (para 22)

H **(4)** What was being sought by the appellant by way of encl. 80 was to have a second bite of the cherry to nullify the whole valuation exercise of the shares which had been duly completed by FHMH after having considered representations made by both the appellant and the second respondent. The court had spelt out the modalities and had entrusted I that specific task of valuation to the agreed independent valuer. To now

further allow a repeat of that process would amount to the court being laboured with further experts and evidence and this was both illogical and counterproductive. There were no merits in the appellant's application. (para 24)

(5) There was no room in the terms of the order of 27 March 2012 for any such further 'representations' or other expert evidence to be allowed in court to challenge or to seek a re-evaluation by the court of the value of the shares once a report of the appointed valuer was filed in court. By providing that representations of the parties pertaining to the valuation exercise were to be directed to the valuer, the court was precluding expressly any further representation on value to be made to the court. If it was to be otherwise, the court would have incorporated express terms to the effect reserving to the parties yet the further right to make submissions or adduce further material, once the evaluation had been submitted to the court. (para 25)

(6) At this stage, there was no valid basis whatsoever to entertain the appellant's further contention that the court, when fixing the purchase price for the shares to be paid by the second respondent to the appellant, should factor in as well a premium to the NTA valuation in the FVR. A consideration of such substantive matter should have been pursued at the trial stage and there was no evidence produced that this position had been canvassed at all by the appellant. Even if it was raised and the court had rejected the same, the appellant's recourse lay in an appeal and not as was sought now to vary the decision of the court in the 27 March 2012 order. (para 37)

(7) Enclosure 84 of the second respondent was what was rightfully envisaged within the ambit of the 27 March 2012 order, that was, for further directions of court, once the valuation exercise, as ordered by the court, was completed. Therefore, the judge was correct in allowing encl. 84 and in making the needful orders to effectuate and complete the transfer of the appellant's shares in the first respondent to the second respondent; and the mechanics for payment of the value for the shares and to bring closure to the appellant's interest in and representation on the Board of the first respondent, once the prices for the shares had been paid. (para 39)

Bahasa Malaysia *Headnotes*

Rayuan-rayuan ini berbangkit daripada dua permohonan yang dibicarakan bersekali di Mahkamah Tinggi. Kedua-dua permohonan di Mahkamah Tinggi timbul daripada perintah terdahulu yang dibuat dalam petisyen di bawah s. 181 Akta Syarikat 1965. Petisyen ini berasaskan dakwaan oleh perayu yang memegang 30% saham dalam responden pertama, bahawa

A berlaku penindasan minoriti dalam pentadbiran dan pengurusan responden pertama. Mahkamah Tinggi menyelesaikan petisyen dengan mengarahkan saham perayu dalam responden pertama dibeli oleh responden kedua ('perintah 27 Mac 2012'). Pihak-pihak melantik penilai bebas ('FHMH') untuk menentukan harga saham. Dalam laporan akhir penilaian ('FVR'), B saham perayu atas dasar jumlah ketara ('NTA') bernilai RM35.97 juta. Perayu memohon kepada Mahkamah Tinggi melalui lampiran 80 bagi perintah agar representasi dibuat terhadap laporan penilaian. Sebaliknya, responden kedua memohon melalui lampiran 84 bagi perintah agar mahkamah membuat penilaian akhir, iaitu 4,500,000 saham pempetisyen C dalam responden pertama dan responden kedua akan membeli dan pempetisyen menjual saham pada harga yang diputuskan. Mahkamah Tinggi menolak lampiran 80 dan membenarkan lampiran 84. Oleh itu, perayu memfailkan rayuan-rayuan ini terhadap keputusan Mahkamah Tinggi dalam (i) menolak lampiran 80; dan (ii) membenarkan perintah dalam lampiran 84. D Perayu menghujahkan bahawa (i) perintah 27 Mac 2012 tidak menghalang pihak-pihak yang terlibat untuk ke mahkamah bagi mencabar FVR sekiranya mereka tidak berpuas hati dengan laporan penilaian harga bagi saham; dan (ii) FHMH gagal mengguna pakai atau memberi pertimbangan secukupnya pada penilaian oleh satu lagi penilai ('Hartanah') yang dikemukakan oleh perayu untuk menyokong nilai pembangunan kasar yang lebih tinggi bagi E tanah milik responden pertama.

Diputuskan (menolak rayuan dengan kos)
Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

(1) Perintah 27 Mac 2013, yang bersifat 'penghakiman muktamad', F menyelesaikan secara muktamad petisyen yang membangkitkan pertikaian. Tiada sebab untuk meragui bahawa perintah-perintah yang dibuat bermaksud untuk menyelesaikan pertikaian antara pihak-pihak kecuali bagi proses pemutusan nilai terhadap saham perayu yang perlu diambil alih oleh responden kedua. Tiada rayuan oleh kedua-dua pihak terhadap penghakiman atau perintah-perintah berikutnya. Tiada juga G penjelasan atau pindaan yang diminta oleh hakim terhadap tujuan dan tahap terma tersebut.

(2) Perintah sampingan atau berikutnya yang termaktub dalam perintah 27 Mac 2012 bertujuan khas membantu mahkamah menetapkan penilai akhir saham yang dipertikaikan. Dalam perintah sampingan, pihak-H pihak perlu melantik penilai bebas yang disetujui bersama. Ini dikuatkuasakan tanpa bantuan mahkamah. Maknanya, pihak-pihak berpuas hati dengan kelayakan dan kebebasan penilai pakar dan dengan itu jelas bersetuju untuk terikat pada keputusan penilaian FHMH.

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(3) Diperuntukkan dengan jelas dalam perintah 27 Mac 2012 bahawa pihak-pihak perlu membuat representasi kepada penilai bagi nilai yang dibuat, dengan perintah mahkamah. Perayu tidak dinafikan hak asasnya bahkan diberi peluang mengemukakan laporan penilaian Hartanah bagi tujuan ini. Terdapat penyemakan menaik oleh FHMH dalam FVR bagi nilai saham apabila dibandingkan dengan nilai cadangan asal dalam draf laporan penilaian yang diedarkan kepada pihak-pihak bagi tujuan maklum balas.

(4) Apa yang dipohon oleh perayu melalui lampiran 80 adalah peluang kedua untuk membatalkan semua langkah penilaian saham yang disempurnakan dengan wajar oleh FHMH selepas mempertimbangkan representasi perayu dan responden kedua. Mahkamah telah menggariskan modaliti dan mengamanahkan tugas menilai khusus pada penilai bebas yang disetujui. Untuk membenarkan proses tersebut berulang kini menyebabkan mahkamah sarat dengan pakar-pakar dan keterangan lanjut yang tidak logik dan tidak produktif. Tiada merit dalam permohonan perayu.

(5) Tiada ruang dalam terma perintah 27 Mac 2012 bagi representasi lanjutan atau keterangan pakar dibenarkan dalam mahkamah untuk mencabar atau memohon penilaian semula oleh mahkamah terhadap nilai saham apabila laporan penilai yang dilantik difailkan di mahkamah. Dengan mengemukakan representasi pihak-pihak tentang langkah penilaian yang perlu dijalankan oleh penilai, mahkamah jelas menghalang representasi lanjutan terhadap nilai yang perlu dikemukakan di mahkamah. Jika sebaliknya, mahkamah pasti akan memasukkan terma nyata yang memberi kesan menangguhkan hak lanjutan pihak-pihak untuk berhujah atau mengemukakan material lanjutan sebaik sahaja penilaian dikemukakan kepada mahkamah.

(6) Pada peringkat ini, tiada apa-apa asas kukuh untuk melayani hujahan lanjut perayu bahawa mahkamah, dalam menetapkan harga belian saham yang perlu dibayar oleh responden kedua kepada perayu, perlu mengambil kira premium penilaian NTA dalam FVR. Pertimbangan hal keadaan besar seperti ini sepatutnya dilakukan di peringkat perbicaraan dan tiada keterangan yang dikemukakan bahawa perayu mengambil langkah ini. Jika pun ini dibangkitkan dan mahkamah menolaknya, langkah seterusnya yang patut diambil oleh perayu ialah merayu dan bukan seperti yang dipohon sekarang iaitu meminda keputusan mahkamah dalam perintah 27 Mac 2012.

(7) Lampiran 84 responden kedua adalah apa yang digambarkan dengan betul dalam ruang lingkup perintah 27 Mac 2012, iaitu bagi perintah lanjut mahkamah apabila perintah penilaian yang diperintahkan oleh

A mahkamah disempurnakan. Oleh itu, hakim bertindak betul dalam membenarkan lampiran 84 dan dalam membuat perintah-perintah yang sepatutnya untuk menguatkuasakan dan menyempurnakan pindahan syer perayu dalam responden pertama kepada responden kedua; selok-belok bayaran nilai saham dan penutupan kepentingan perayu dan
B representasi Lembaga responden pertama apabila harga saham dibayar.

Case(s) referred to:
Campbell v. Edwards [1976] 1 WLR 403 ***(refd)***
Collier v. Mason 53 ER 613 ***(refd)***
Cristel v. Cristel [1951] 2 All ER 574 ***(refd)***
C *Folin & Brothers Sdn Bhd & Ors v. Folin Food Processing Sdn Bhd & Ors [2011] 8 CLJ 141 CA* ***(refd)***
Genisys Integrated Engineers Pte Ltd v. UEM Genisys Sdn Bhd & Ors [2009] 1 LNS 1202 CA ***(refd)***
Geowin Construction Pte Ltd (in Liquidation) v. Management Corporation Strata Title Plan No 1256 [2007] 1 SLR (r) 1004 ***(refd)***
D *Kanawagi Seperumaniam v. Penang Port Commission [2002] 8 CLJ 503 HC* ***(refd)***
Lee Kee Choong v. Empat Nombor Ekor (NS) Sdn Bhd & Ors [1975] 1 LNS 81 FC ***(refd)***
Leong Ah Weng v. Neoh Thean Soo & Anor [1983] 2 CLJ 5; [1983] CLJ (Rep) 227 FC ***(refd)***
Nicholson v. Nicholson ALR Vol 4 1997, 212 ***(refd)***
Public Bank Bhd v. Chan Tak Kow [1988] 1 LNS 107 HC ***(refd)***
E
Legislation referred to:
Companies Act 1965, s. 181

For the appellant - K Kirubakaran (Mark Ho & Jananee Gopal with him); M/s Chellam & Wong
For the 1st respondent - John Skelchy (Vishal Kumar with him); M/s James Monteiro
F *For the 2nd & 3rd respondents - Cyrus Das (Malik Imtiaz Sarwar, Yoong Nim Chor & Pavendeep Singh with him); M/s Yoong & Partners*

[Editor's note: For the High Court judgment, please see Zen Courts Sdn Bhd v. Bukit Jalil Development Sdn Bhd & Ors [2013] 1 LNS 587 (affirmed)]

G *Reported by Najib Tamby*

JUDGMENT

Varghese George JCA:

H **Introduction**

[1] There were two appeals by the same appellant before us. They were appeals:

(a) against the dismissal by the High Court of the appellant's encl. 80
I application; and

(b) against the orders granted by the High Court pursuant to the second respondent's encl. 84 application.

[2] The High Court had heard both the applications together and issued one decision. Before us, the appeals were also heard together on 19 February 2014. We had on the same day dismissed the said appeals and affirmed the decision of the High Court.

Background

[3] The two applications before the High Court was consequential to and flowed from an earlier order of Abdul Aziz J (as he then was) made on 27 March 2012 in this petition brought under s. 181 of the Companies Act 1965. The appellant was the petitioner and held a 30% shareholding in the first respondent.

[4] The petition was premised upon allegations by the appellant of minority oppression in the affairs and management of the first respondent. The High Court's order of 27 March 2012 disposing the petition ordered that there be a buy-out of the appellant's shares in the first respondent by the second respondent. The orders made after a full hearing were as follows:

(i) That the 2nd Respondent shall buy-out all the 4,500,000 shares of the Petitioner in the 1st Respondent, at the price of those shares to be determined by an independent valuer on a 'net tangible asset' basis, such valuation to be as at the date of this Order.

(ii) That the appointment of the independent valuer is to be mutually agreed by the Petitioner and the 2nd Respondent and in the event those parties cannot agree to the independent valuer, either of those parties are at liberty to apply to Court to appoint a valuer.

(iii) That the valuation is to be done within three (3) months from the date of this Order and the parties may make representations to the valuer as to the valuation.

(iv) That the valuer shall file the valuation report into Court and the parties may apply.

(v) That the Court will determine the final value of the shares and the terms of the buy-out order.

(vi) That the costs of the valuation shall be borne and paid by the 1st Respondent.

(vii) That should the 2nd Respondent be unable to proceed with the buy-out the Petitioner shall be at liberty to apply.

(viii) That the costs of this Petition of RM50,000.00 which includes all previous orders for costs in the cause, shall be paid by the 2nd and 3rd Respondents to the Petitioner.

A (ix) No order as to costs against the 1st Respondent.

(x) That parties shall be at liberty to apply.

[5] Pursuant to order (ii) above the parties by mutual agreement appointed Messrs Ferrier Hodgson MH Sdn Bhd (FHMH) as the independent valuer to
B determine the price of the subject shares. After several extensions of time agreed to by the court and the parties, FHMH produced a draft valuation report dated 16 November 2012 which was circulated to the parties for their comments. Representations were made thereto by the parties and FHMH then proceeded to issue the Final Valuation Report (FVR) on 31 December 2012 wherein the appellant's shares on a 'net tangible assets' basis (NTA)
C (of the first respondent) was valued at RM35.97 million.

Enclosure 80

[6] The appellant's encl. 80 application (which was dismissed) had sought for the following orders to be made by the court:

D (i) Representations be made on the Valuation Report dated 31.12.2012 prepared by Messrs. Ferrier Hodgson MH Sdn. Bhd., in such manner that this honourable court shall deem fit, in particular and including any directions on the filing of affidavits, the attendance of experts at court to give testimony, and the cross examination of
E the said experts;

(ii) Costs and disbursements of the appointment of such experts and their attendance in court including all incidentals, to be borne and paid by the 1st Respondent;

(iii) Costs of this application, and

F (iv) Further or other orders or directions that this honourable court shall deem fit.

Enclosure 84

[7] On the other hand *vide* encl. 84, the second respondent being satisfied
G with the FVR, had applied for the following orders:

1. That, pursuant to order no. (v) of the Order dated 27 March 2012, the Court determines the final value, being the price of the 4,500,000 shares of the Petitioner in the 1st Respondent, and the 2nd Respondent shall buy and the Petitioner shall sell such shares at the
H price so determined.

2. That the Court makes such ancillary terms of such buy-out of such shares by the 2nd Respondent from the Petitioner as the Court deems fit.

3. That the costs of this application be borne by the Petitioner or as
I may otherwise be determined by the Court.

4. Such other and further relief or Order as this Honourable Court deems to be fair and appropriate.

Decision Of The High Court

[8] The following extracts from the grounds of decision of the learned judge capture the essential basis upon which the court proceeded to dismiss the appellant's encl. 80, whilst allowing the respondent's encl. 84:

> 4. From the terms of the applications and their related affidavits, it would appear that the Petitioner is not saying for a moment that the 2nd Respondent's application is misplaced. After all, the buyout was the principal order of the Court. What it in essence is saying is that before that order on the final value of the shares and the terms of the buyout is made, it wants an opportunity to make representations and call experts on the report and its contents. According to the Petitioner, it ought to be allowed to make representations for various reasons which I shall summarise as follow.
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> 10. In opposition, the crux of the 2nd Respondent's submissions is that the Petitioner's application was not about making representations. It was really an attempt by the Petitioner to impugn that single valuation report prepared by a mutually agreed valuer. This was entirely outside the terms of the order of Court made on 27.3.2012.
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> 12. Having examined all these matters, the 2nd Respondent submitted that the report before the Court was fair, considered, balanced and had taken into account all presentations and representations of the parties. The parties, especially the Petitioner had been given all latitude and there was no need for any verification to be conducted by this Court. Further, it was submitted that it had not been shown how FHMH had "got it wrong" whether in methodology, evidence or in any other regard.
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> 18. In this case, the Petitioner claimed to be making representations. However, in articulating its various those [sic] representations or reasons, it is quite apparent that the Petitioner is in fact challenging the valuer and the valuation. This is quite outside the ambit of the order and as pointed out, not even condoned by the Court of Appeal in *Genisys Integrated Engineers v. UEM Genisys Sdn Bhd & 3 Ors* [Court of Appeal Civil Appeal No. W-02-1158-2005 (No. 3)].
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> 19. More significantly and of importance is the fact that the matters now raised by the Petitioner have already been raised before FHMH. As evidenced from the valuation report, FHMH have duly taken account of those matters or representations of the Petitioner. A perusal of the report readily confirms that FHMH had *inter alia* taken into account the "written representations" of the Petitioner and the 2nd Respondent as its "sources of information" which it had then "used to form our opinion on the fair valuation" [see paragraph 1.3 at pages 8 and 9 of the report].
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> 20. In fact, when the Petitioner's concerns today are put into its proper perspective, it appears that the Petitioner is not suggesting that its representations have been disregarded. Rather, it suggests that there are "no clear justifications" for FHMH to have come to the

A conclusions and valuation that it did. This is quite different from making representations; and certainly an entirely different exercise from that allowed under the terms of the order of 27.3.2012. This is clearly a challenge of the valuation.

22. Before embarking on the actual valuation, FHMH acquainted itself with background information and the financial position of the 1st Respondent. Such information included familiarising itself with the relevant joint development agreement and court actions. As for the valuation itself, FHMH's approach, as directed by the Court, used the NTA approach. This is extremely critical as this was the specific order of Court.

24. In ascertaining the market value of the land, it cannot be denied that FHMH considered both valuations by Henry Butcher and Hartanah [see paragraphs 4.1.1. and 4.1.2; and pages 25 to 32] ...

25. In the report, FHMH recognised that there was a subsequent event of a Supplemental Joint Development Agreement made on 3.7.2012; but this was disregarded. FHMH gave its reasons - because the order of Court directed the valuation to be as at 27.3.2012.

27. The Petitioner has further suggested that a premium must be added to the value ascertained by FHMH. This is because the transaction is not at arm's length between a willing buyer and a willing seller. This transaction or buyout was born out of an oppression Petition where in order to do justice the Court ordered a buyout. According to the Petitioner, justice surely cannot be on the value of the shares alone but a premium imposed to reflect the Court's disdain for the act of oppression on the minority.

31. On this aspect, the 2nd Respondent argued that given there was no appeal against the order of the Court made on 27.3.2012, this proposition of adding a premium to the price of the shares to reflect the oppression ought to be disregarded. If at all this proposition was to be considered, is should have been raised at the outset.

32. Again, I must agree. If there is any argument to be made for such imposition or enhancement, it ought to have been made at the time when the Petition was heard, and when addressing the reliefs sought. As the terms of the order did not extend to affixing this premium for this purpose, be it in the form of interest or any other component, this additional term is refused. In any case, I do not find the circumstances of this case (as explained and urged by the Petitioner) such as to fall into this category of "extremely limited cases" where a premium is warranted.

35. Following from the above, the application in enclosure 80 is therefore dismissed with no order as to costs. As for enclosure 84, having further heard parties and having taken into consideration further agreed terms, accordingly, it is ordered that:

(i) with regard the final price of the shares using the NTA approach as at 27.3.2012, it shall be fixed at RM7.99 per share with the aggregate purchase price of RM35.97 million;

(ii) this buy-out shall be completed within four months from the date of this order on a business day in Kuala Lumpur and at an office address in Kuala Lumpur as notified with at least 7 days' prior written notice by the 2nd Respondent (or its solicitors) to the Petitioner (or its solicitors);

(iii) the buy-out shall be completed by paying RM35.97 million to the Petitioner by way of a bankers' draft and the Petitioner shall deliver to the 2nd Respondent a duly executed valid and proper instrument of transfer for the 30% shares together with the corresponding share certificates for the 30% shares as well as such other executed documents as may be necessary for revenue and stamp duty purposes; and

(iv) the Petitioner procures that Mr Yeoh Keng Tat resigns as a director of the 1st Respondent, such resignation to be effective on or before the date of completion of the purchase of the 30% shares.

Submissions Of The Appellant – Summary

[9] The thrust of the appellant's submission was that the order of court of 27 March 2012 did not preclude the parties involved of coming to court to 'challenge' the FVR if either of them was not happy with the reported valuation of the price for the subject shares. Emphasis was in this respect placed on the terms '... and the parties may apply' and 'liberty to apply' found in order (iv) and (x) respectively of the order of court of 27 March 2012. It was argued that the court was never intended to be a mere 'rubber-stamp' once the valuation exercise was completed and it was still open to concerned parties to make 'representations' to the court on the valuation exercise undertaken and/or the valuation arrived at by the valuer.

[10] It was contended for the appellant too, that in this case FHMH had failed to adopt or give sufficient regard to the valuation done by Hartanah Consultants (Valuation) Sdn Bhd (Hartanah) which had been submitted by the appellants to substantiate a higher Gross Development Value (GDV) in respect of the land belonging to the first respondent. It was further pointed out that the land valuation undertaken by Henry Butcher Malaysia Sdn Bhd (Henry Butcher) (relied upon by FHMH) and the derived GDV (RM2.5 million) based on the Joint Development Agreement of 16 March 2010, had ignored a subsequent announcement pertaining to GDV of the land that had been made by or for the first respondent.

[11] It was also canvassed for the appellant that the final price to be fixed by the court for the shares should include a 'premium' element in addition to the assessed NTA valuation, since the disposition of the shares by the

appellant was not on a 'willing seller-willing buyer' basis but on a forced 'buy-out' basis; the court, it was urged, was entitled to do so to reflect the fair value of the shares in the market and/or the court's disdain for the oppression occasioned to the appellant.

Submission Of Second Respondent – In Summary

[12] Counsel for the second respondent submitted that the objective underlying the appellant's application was purely to impugn the valuation arrived at as stated in the FVR, and if allowed this would in effect draw the court into undertaking a 'revaluation' exercise to fix a share-price in variance to that assessed by FHMH. This, it was submitted, would not accord with the terms of the order of court of 27 March 2012 which had entrusted such assessment to be made by an independent single-expert valuer agreed to by the parties and whose finding was to be binding, unless of course, there was obvious evidence of blatant fraud or collusion in that exercise or conclusion reached.

[13] It was contended that the term '... the parties may apply' provided in order (iv) of the order of court of 27 March 2012 had to be restrictively construed to allow the parties to be heard further only in respect of the working out of the details for the implementation of the transfer of the appellant's 30% shareholding to the second respondent (and incidentals thereto) consequent to the price for the shares being determined by the independent valuer and confirmed by the court (see order (v) following). It was argued that accordingly it did not provide for a situation where the very valuation exercise entrusted to an independent valuer by the court could be reopened for scrutiny or further assessment at the instance of any unsatisfied party. There was no exceptional circumstance shown in this case in any event for the court to depart from that valuation already fixed by FHMH.

[14] Further, it was highlighted to us that in this case, the appellant had the opportunity as a matter of fact to make and had made their representations on the draft valuation report prepared by FHMH and extended to the parties for their comments. FHMH had in turn taken into consideration the inputs of the appellant and had even made an upward revision in respect of the originally proposed valuation for the 30% shareholding held by the appellant from RM33.78 million to RM35.97 million in the FVR submitted to court. The valuation as per the FVR was in any event a reasoned, structured and fair one in all the circumstances of the matter and this had been accordingly accepted by the learned judge.

[15] It was also submitted that the order of court of 27 March 2012 did not provide that there ought to be a consideration of a further sum by way of 'premium' to the NTA value assessed, nor that the parties were entitled to

submit further thereon or on any other similar issue, when the value for the shares were subsequently confirmed and the terms of the buy-out were issued by the court pursuant to order (v) thereto. The value for the shares was expressly restricted to be derived on the basis of the NTA valuation of the first respondent. The order of court of 27 March 2012, it was reiterated, was a final one made by the judge who had heard the parties and considered all submissions in respect of the oppression petition; the question of an additional 'premium' over and above the value for the shares on the ordered NTA basis, and only brought up now by the appellant, was therefore a non-issue.

Our Deliberation And Decision

[16] In our assessment there were only two issues before us. The primary issue was whether it was within the ambit of the terms as ordered by the court on 27 March 2012 to allow additional 'representations' to be made or for further evidence to be adduced in court (by way of affidavit or by examination/cross-examination of other experts) on the question of the value of the shares as duly assessed by FHMH and set out in the FVR. The subsidiary issue was whether the terms of that same order provided for within its scope any further consideration by the court of argument at this stage that a 'premium' should be added-on to the NTA valuation made in the FVR, that is before the court fixed the final value of the appellant's 30% shareholding in the buy-out ordered.

[17] Paramount in our consideration was the fact that the order of court of 27 March 2012 was in the nature of a 'final judgment' disposing off conclusively the rather contentious petition. There was no cause for any doubt in our mind that the orders made on that day were intended by Abdul Aziz J to bring a closure to the dispute between the parties, save only for a process for the determination of the value of the appellant's shares to be taken over by the second respondent. Upon closer analysis, it would be appreciated that order (i) of the order of court of 27 March 2012 was in effect, the judgment of the court in the matter, that is, after the parties had been fully heard.

[18] It was also pertinent to note here that there was no appeal by either of the concerned parties against that judgment or in regard to the other consequential orders made therein, nor was there any clarification or variation sought of Abdul Aziz J as to the purport or extent of those terms.

[19] The scheme laid out for the valuation exercise ordered by the court to arrive at the price of the appellant's shares for purposes of the buy-out by the second respondent, was specifically enumerated in orders (ii) to (iv). It followed therefore that these consequential or ancillary orders, as they were, were principally intended to assist the court to fix a final value for the shares in question. This specific context of those consequential orders had to

be borne in mind in the forefront of any determination of the issues now called into the questions in the encl. 80 and encl. 84 applications of the respective parties.

[20] It was envisaged in those ancillary orders that firstly the parties were to appoint a mutually agreed independent valuer. This had been effected (without recourse to the court, it must be noted). The significance of this, in our view, was that the parties were satisfied as to the credentials and independence of that single expert-valuer, thus explicitly agreeing to be bound by the result of the valuation that was to be undertaken by FHMH in this case.

[21] The rest of the matters within the order of court of 27 March 2012 that were material for our consideration were the following:

> (a) (iii) That the valuation is to be done within three (3) months from the date of this order and the parties may make representation to the valuer as to the valuation;
>
> (b) (iv) That the valuer shall file the valuation report into court and the parties may apply;
>
> (c) (v) That the court will determine the final value of the shares and the terms of the buy-out order;
>
> and the 'omnibus' general provision:
>
> (d) (x) That the parties shall be at liberty to apply.

[22] What need to be highlighted was that it was expressly provided in order (iii) that the parties were to make 'representation' to the valuer in respect of the valuation being undertaken at the behest of the court. The appellant was not denied this basic right, and as observed earlier, the appellant had indeed availed of this opportunity by submitting Hartanah's Valuation Report to this end. What was also not in dispute was that there had been an upward revision by FHMH in the FVR of the value for the subject shares when contrasted with the value that had been originally proposed in the draft valuation report circulated to the parties for their feedback.

[23] It was also evident from paras. 5.0 and 6.0 of the FVR that FHMH had considered both the valuation by Henry Butcher and Hartanah in respect of the value of the land. FHMH was however of the view that Hartanah's postulated GDV was 'optimistic'; FHMH had nevertheless adopted a mid-point valuation from a possible range to reflect the GDV as at the cut-off date (27 March 2012) having factored-in a fair increment (for elapsed time) to the land value and to the original GDV as stated in the Joint Development Agreement (17 March 2010). It could not be gainsaid that the valuation arrived at by FHMH was indeed a reasoned one.

[24] Obviously, what was therefore being sought by the appellant by way of encl. 80 was to have a 'second bite at the cherry', to nullify the whole valuation exercise of the shares which had been duly completed by FHMH, after having considered representations made by both the appellant and the second respondent. The court had spelt out the modalities and had entrusted that specific task of valuation to the agreed independent valuer. To now further allow a repeat of that process would amount to the court being laboured with further experts and evidence and this was both illogical and counterproductive. From a fundamental foundational perspective there was therefore no merits in the appellant's application.

[25] Additionally in our view there was no room in the terms of the orders (iii), (iv) or (v) in the order of the court of 27 March 2012 for any such further 'representations' or other expert evidence to be allowed in court to 'challenge' or to seek a re-evaluation by the court of the value of the shares once a report of the appointed valuer was filed in court. By providing that representations of the parties pertaining to the valuation exercise were to be directed to the valuer, the court was precluding expressly any further representation on value to be made to the court. If it was to be otherwise, the court would have incorporated express terms to the effect reserving to the parties yet the further right to make submissions or adduce further material, once the valuation had been submitted to the court.

[26] As observed by us earlier the specialist valuation exercise undertaken by the agreed independent valuer was intended to assist the court to fix a value to be paid by the second respondent for the shares. In our assessment it could not have been within the contemplation of the court therefore to keep this issue still open and invite upon the court further strain on the court's time and resources to revisit the valuation arrived at by the expert or referee solely appointed for that purpose.

[27] It must be stated that the mechanics for the determination of a conclusive value (either for land or shares) by a single expert, either appointed by the court or agreed to by the parties, was not uncommon in a judicial order. (*Folin & Brothers Sdn Bhd & Ors v. Folin Food Processing Sdn Bhd & Ors*, CA [2011] 8 CLJ 141; *Genisys Integrated Engineers Pte Ltd v. UEM Genisys Sdn Bhd & Ors*, CA, [2009] 1 LNS 1202). In *Lee Kee Choong v. Empat Nombor Ekor (NS) Sdn Bhd & Ors* [1975] 1 LNS 81; [1975] 1 MLJ 134, the Federal Court ruled that a valuation entrusted to independent valuer/expert, in similar circumstances as in this instant case, could only be impeached for fraud, or for miscarriage of justice such as where the valuer had taken into account something which he ought not to have considered or where the valuer had misinterpreted an underlying agreement or acted on some wholly erroneous principle; the valuation should not be disturbed otherwise and the court should refuse to act even if the price were excessive or small but was explainable. (see also *Collier v. Masort* 53 ER 613 referred by the Federal Court in that decision).

[28] An expert's decision could only be set aside on the basis of fraud or partiality or if there was any breach of the expert's appointment or if he had acted outside his mandate or remit. (*Campbell v. Edwards* [1976] 1 WLR 403; *Geowin Construction Pte Ltd (in Liquidation) v. Management Corporation Strata Title Plan No 1256* [2007] 1 SLR (r) 1004). Basically the issue was one centred in contract, namely, where the parties had agreed on a common valuer or were bound to the valuation of an agreed single expert, here by the terms of the order of 27 March 2012. So long as the valuation was given honestly and in good faith the parties were bound to it, even if the expert had made a mistake.

[29] Now then would the terms '... and the parties may apply' included in order (iv) of the order of court of 27 March 2012 change that position. There was no dearth of authority that have upheld the position in law that 'liberty to apply' and terms of similar nature or tenor, incorporated in a court order, *prima facie* referred to the right of parties to seek out further directions as to the working out of the actual terms of the order. In *Public Bank Bhd v. Chan Tak Kow* [1988] 1 LNS 107; [1988] 3 MLJ 330 Lamin J (as he then was) noted:

> It should be confined to the problem relating to enforcing or executing the order such as, for example, if there is some difficulty in its enforcement because of the terms of the order later found to be unclear or doubtful when faced with the actual situation on the ground, the party which obtained the order may approach the court again for its indulgence to seek clarification.

The court there agreed with Somervell LJ in *Cristel v. Cristel* [1951] 2 All ER 574 that to allow the expression to mean that 'leave was reserved to both parties to make any application concerning any part of the order at any subsequent time' was too wide a statement and it had to be restricted 'to the working out of the actual terms of the order itself'.

[30] The meaning to be accorded to 'liberty to apply' has been eloquently defined by Jenky J in the case of *Nicholson v. Nicholson* ALR Vol 4 1997, 212 at 216 in the following terms:

> 'Liberty to apply' is simply a device by which further orders may be made when necessary for the purposes of implementing and giving effect to the principal relief already pronounced.

(quoted in *Kanawagi Seperumaniam v. Penang Port Commission* [2002] 8 CLJ 503; [2001] 5 MLJ 433 at 468).

[31] We were therefore in agreement with the learned judge that the term '... and the parties may apply' in order (iv) did not mean that the either of the parties was entitled as a matter of right to adduce further evidence so as to, in effect, reopen the valuation for the shares arrived at in the FVR. Those

words did not extend to allow a substantive attack on the valuation itself completed by a valuer agreed to by the parties. The court was obliged, unless there were compelling reasons as identified above, to sustain the integrity of the valuation done for the court.

[32] The terms '... and the parties may apply' in the said order (iv) had necessarily to be construed within the limited context of that order where the specific direction or requirement of the court was that the valuer had to file the completed valuation in court. Parties were, in our view, restricted as such to any application, for example, where the valuer had inordinately delayed or was otherwise refusing to complete the valuation after the parties had submitted their representations; the underlying purpose being to remedy any impasse encountered in the carrying out of the scheme for completing and implementing the principal judgment of the court.

[33] The catch-all liberty to apply provided for in order (x) was of no assistance either to the appellant who was here seeking a re-evaluation of the price stated in the FVR submitted by FHMH to the court. The scope of any application under this general liberty reserved to the parties was to seek further assistance or directions as to the carrying out of the overall terms of the judgment of court of 27 March 2012 for the buy-out of the appellant's shares should there be any hiccup encountered somewhere in that process. It is pertinent to note here that as per Abdoolcader FJ in *Leong Ah Weng v. Neoh Thean Soo & Anor* [1983] 2 CLJ 5; [1983] CLJ (Rep) 227; [1983] 2 MLJ 119:

> ... all orders of court carry with them in gremio liberty to apply to court&as this is implied without it being expressly reserved that.

[34] We turn now to the subsidiary issue whether, the order (v) (&the court will determine the final value of the shares and the terms of the buy-out) read by itself, or together with order (x) (that the parties be at liberty to apply), entitled the appellant to raise further submissions for the consideration of the court that the final value for the shares should also incorporate an additional premium sum to reflect, as is contended now, the forced buy-out scenario and/or the court's disdain for the oppression suffered by the appellant.

[35] As alluded to earlier by us, the order of court of 27 March 2012 was for all intents and purposes a 'final judgment' save for such mechanism or process to fix the value of the shares. By the terms of order (i) the value of the shares in the buy-out ordered was expressly to be derived on an NTA basis of the first respondent. If there was to be some further element to be considered or taken into account once the NTA valuation had been determined, the court would surely have provided for this expressly as a further specific order or in terms of liberty to the parties to address the court for any 'premium' to be additionally factored in, before the court fixed the final value.

[36] The order of court of 27 March 2012 was issued at the conclusion of a trial of a s. 181 Petition. It could not have been within the intention of Abdul Aziz J to allow any further consideration which would increase the valuation for the shares (ordered to be on the NTA basis of the first respondent), for if it was to be so His Lordship would have decreed accordingly in that order itself. Such a further consideration was not a mere 'consequential' matter or issue but one which would have serious impact on the price to be paid for the shares in question by the second respondent. It need be highlighted again that the appellant did not appeal against the decision of the court of the 27 March 2012, which should have been done if it was dissatisfied with the terms of that judgment.

[37] We were therefore in agreement with the learned judge, who dismissed the encl. 80 application of the appellant, that there was no valid basis whatsoever to entertain at this stage the appellant's further contention that the court when fixing the purchase price for the shares to be paid by the second respondent to the appellant, should factor in as well a 'premium' to the NTA valuation in the FVR. A consideration of such a substantive matter (which would have marked impact on the final purchase price to be paid) should have been pursued at the trial stage and there was no evidence produced that this position had being canvassed at all by the appellant there; even if it was raised and the court had rejected the same, the appellant's recourse lay in an appeal and not as is sought now to vary the decision of the court of 27 March 2012 in hindsight.

[38] In our reading, order (v) in its context within the order of court of 27 March 2012, only meant that the court reserved its right to put its formal seal to the value of the shares, that is, after the court had been satisfied that the value for the shares in question had been determined as per the terms of order (i) and in compliance with the steps outlined in the further orders (ii) to (iv). The processes laid out had been duly complied with in this case and all that remained was for the court to confirm the price for the divestment of the appellant's shareholding in the first respondent and give any further directions to implement the buy-out ordered.

[39] In our view, encl. 84 of the second respondent was what was rightfully envisaged within the ambit of order (v) of the order of court of 27 March 2012, that is, for further directions of court once the valuation exercise as ordered by the court was completed. The learned judge was correct therefore in allowing encl. 84 and in making the needful orders to effectuate and complete the transfer of the appellant's shares in first respondent to the second respondent, the mechanics for payment of the value for the shares and to bring generally closure to the appellant's interest in and representation on the board of the first respondent, once the price for the shares had been paid.

Conclusion

[40] We therefore found no error committed by the learned judge in dismissing encl. 80 of the appellant, whilst allowing encl. 84 of the second respondent on 18 July 2013, against which these appeals had been brought. There were no merits in both the appeals. For the reasons discussed and elaborated above we unanimously dismissed the appeals with costs to be paid by the appellant to the second respondent.